SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-395

YUEN SANG LOW, SHUNG POY LOUIE, and FAT YING CHIN, *Petitioners,*

vs.

JOHN N. MITCHELL, Attorney General of the United States, and CECIL W. FULLILOVE, District Director, San Francisco District, Immigration and Naturalization Service, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The Petitioners, Yuen Sang Low, Shung Poy Louie, and Fat Ying Chin, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the District Court's granting of Petitioners' motion for summary judgment of August 7, 1970.

OPINIONS BELOW

The order and judgment of the District Court granting the Petitioners' motion for summary judgment is printed at pages 22 and 23 in the record and is appended to this petition (Appendix A, pages i-ii). The opinion of the Court of Appeals for the Ninth Circuit reversing the judgment of the District Court is also appended (Appendix B, pages iii-xi).

JURISDICTION

The judgment of the Court of Appeals was filed and entered on May 30, 1973. The order of the Court of Appeals granting the Petitioners' motion for recall and stay of mandate was filed and entered on July 16, 1973 (Appendix C, page xii). A further stay of mandate was granted to September ....., 1973 (Appendix D, p. xiii). The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether an alien who has been excluded, ordered deported, and paroled into the United States is "physically present" for the purpose of satisfying the minimum time requirement for suspension of deportation under Section 244 of the I. & N. Act, 8 USC 1254?

2. Whether an alien who has been excluded, ordered deported, and paroled into the United States is

"deportable" within the meaning of Section 244 of the Act?

STATUTES INVOLVED

Section 212(d)(5) of the Act, 8 USC 1182(d)(5), authorizes the discretionary granting of parole:

> (5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Section 237(a) of the Act, 8 USC 1227(a), provides in part:

> § *1227. Immediate deportation of aliens excluded from admission or entering in violation of law—Maintenance expenses*
>
> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attor-

ney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper.

Section 241(a)(1) of the Act, 8 USC 1251(a)(1), provides in part:

> § *1251. Deportable aliens—General classes*
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Section 243(h) of the Act, 8 USC 1253(h), provides that:

> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Section 244(a)(1) of the Act, 8 USC 1254(a)(1), provides that:

> SUSPENSION OF DEPORTATION; VOLUNTARY DEPARTURE
>
> SEC. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; . . .

STATEMENT OF THE CASE

Each Petitioner is a native and citizen of China who more than twenty years ago sought admission to the United States as a citizen, whose claim to citizenship was rejected, and who was ordered excluded by the Board of Immigration Appeals. During the pendency of those proceedings, each was paroled into the United States pursuant to a section of law then in effect identical to Section 212(d)(5) of the Immigration and Nationality Act, 8 USC 1182(d)(5), and each alien has been in the United States ever since.

Each alien submitted an application for suspension of deportation and adjustment of status to that of an alien lawfully admitted for permanent residence under Section 244 of the Immigration and Nationality Act (hereinafter referred to as the Act), 8 USC 1254. The

District Director of the Immigration and Naturalization Service (San Francisco district) refused to accept the applications on the ground that these aliens are not eligible for the relief afforded by that section. The aliens then sought review of the administrative holding in the District Court under 5 USC 701, et seq. That Court granted their motion for summary judgment on August 7, 1970, finding that they had been "physically present" in the United States in excess of seven years, as required by Section 244(a)(1), and that they were therefore entitled to file applications for suspension of deportation.

Defendants appealed from the District Court's judgment to the United States Court of Appeals for the Ninth Circuit. On May 30, 1973, the Court of Appeals reversed the decision of the District Court, holding that the aliens were neither "physically present" in the United States nor "deportable" within the meaning of Section 244(a)(1).

On June 27, 1973 the Petitioners herein filed a motion for recall and stay of mandate before the Court of Appeals for the purpose of allowing Petitioners to petition this Court for writ of certiorari. That motion was granted on July 16, 1973 (Appendix C, infra). Petitioners filed a motion to further stay issuance of mandate for a period of twenty-five days on August 14, 1973. That motion was granted on ...., 1973 (Appendix D, infra). This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The writ of certiorari is sought because the decision of the Court of Appeals is contrary to decisions of this Court pertaining to the statutory construction of deportation statutes; because the decision of the Court of Appeals misconstrues prior decisions of this Court; because the issues presented herein raise important questions pertaining to the administration of the immigration and nationality laws of the United States; and because these issues have not been, but should be, settled by this Court.

ARGUMENT

In adopting a technical construction of Section 244 so as to render Petitioners ineligible for its relief, the lower court ignored the well-established rule that where a statute relating to the deportation of an alien is reasonably susceptible of more than one construction, the doubt should be resolved in favor of the alien. *Barber v. Gonzales,* 347 U.S. 637, 74 S.Ct. 822 (1954); *Fong How Tan v. Phelan,* 333 U.S. 6, 92 L.Ed. 433 (1948). Also see *Errico v. INS,* 349 F.2d 541 (9th Cir. 1965), aff'd 385 U.S. 214, 87 S.Ct. 473 (1966); *Garcia-Gonzales v. INS,* 344 F.2d 804 (9th Cir. 1965).

In the earlier case of *Wadman v. INS,* 329 F.2d 812, 816-817 (9th Cir. 1964), the Ninth Circuit itself stated the proper rule:

> "In construing Section 244 we are in an area in which strict construction is peculiarly inappro-

> priate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical interpretation of the law. A strict and technical construction of the language in which this grant of discretion is couched would frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship."

In reversing the decision of the District Court in favor of the Petitioners, the Court of Appeals for the Ninth Circuit held that the Petitioners were not eligible for Section 244 relief on two grounds:

1. Petitioners were not "physically present" in the United States for the required period;
2. Petitioners were not "deportable" within the meaning of Section 244 of the Act.

I

PETITIONERS HAVE BEEN "PHYSICALLY PRESENT" IN THE UNITED STATES WITHIN THE MEANING OF SECTION 244 OF THE ACT.

The Ninth Circuit noted in its decision that "if the words 'physically present'[1] are to be taken literally, it is obvious that the aliens meet this requirement," but nevertheless held that they had not been "physically present." After holding that Petitioners were

---

[1]The phrase "physically present" is not set forth in definitions to the Act (Section 101; 8 U.S.C 1101).

not "deportable" within the meaning of Section 244 (a), the lower court stated "this position at first blush seems as anomalous as our holding that these aliens are not technically physically present in the United States."

The Court of Appeals further stated that it was "regretfully constrained" to apply the holding of *Leng May Ma v. Barber,* 357 U.S. 185, 78 S.Ct. 1072 (1958), (hereinafter referred to as *Ma*) to the present case and concluded that a paroled alien was not "physically present" in the United States for purposes of Section 244 of the Act. *Ma,* however, is distinguishable from the present case and does not require that result.

The holding of *Ma* was that the alien in question was not eligible for relief under Section 243(h) of the Act, 8 U.S.C. 1253(h), on the ground that as a paroled alien, she was not "within the United States" as required by that statute.

This phrase "within the United States" does not appear in Section 244 of the Act. Section 244, in broad language, refers to an alien who has been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application".

The phrase "physically present in the United States" is on its face clear and unambiguous. The words of the statute should be construed in accordance with their plain and obvious meaning in the absence of a clear indication in the body of the Immigration and Nationality Act that they were not to be so con-

strued. This Court in *Ma* recognized the distinction between the connotations of the phrases "within the United States" and "physically present in the United States" when it stated that the detention of an alien in this country in custody pending determination of his admissibility "does not legally constitute an entry *though the alien is physically within the United States.*" 357 U.S. 185 at page 187, emphasis supplied.

A further distinction between the circumstances of the present case and the circumstances found in *Ma* should be noted. In *Ma,* this Court noted that parole had developed out of an administrative and Congressional desire to avoid needless confinement of an alien, and expressed concern that a ruling in the alien's favor would prompt curtailment of current parole policy by the Immigration and Naturalization Service, a policy change not consistent with the wishes of Congress. In the present case, however, a decision in their favor would have no affect upon the continuation of parole relief. The class of aliens affected would only be those who have been in the United States for more than seven years after exclusion and parole and who are unable to obtain relief from deportation and adjustment of status through any other means.

When Congress revised the wording of Section 244 in 1952, it was not for the purpose of excluding from its scope aliens such as these Petitioners. By the amendment Congress sought to insure that the applicant be actually physically present for the required period, rather than merely establish residence for the same period.

The lower court, in an admittedly technical decision, deprived Petitioners of their right to a reasonable interpretation of Section 244 in their favor, and in so doing departed from the principles of statutory construction established by this Court and by the Ninth Circuit in its previous decisions.

II

PETITIONERS ARE "DEPORTABLE" WITHIN THE MEANING OF SECTION 244 OF THE ACT

In addition to the requirement that an alien be "physically present" for the prescribed seven year period, Section 244 requires that an alien be "deportable under any law of the United States." Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). The lower court, again relying on this Court's decision in *Ma,* held that Petitioners as paroled aliens were excludable rather than deportable.

It is submitted that the lower court again improperly relied on an overly technical reading of the broad language of Section 244 in order to remove Petitioners from its purview.

The Immigration and Nationality Act provides for two classes of deportable aliens. The first class of deportable aliens includes those who are excludable under Section 212 of the Act, 8 U.S.C. 1282, and deportable under Section 237 of the Act, 8 U.S.C. 1227, which provides in part:

> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to

> the country whence he came . . . unless the Attorney General, in an individual case, concludes that immediate deportation is not practicable or proper.

The second class of deportable aliens are those enumerated in Section 241 of the Act, 8 U.S.C. 1251. Section 241 provides in part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . .

"Deportable" is not a defined term in the Immigration and Nationality Act. The term "deportation" has been held to include "exclusion". *Knauff v. McGrath,* 181 F.2d 839, 841 (2d Cir. 1950), aff'd on other grounds 338 U.S. 537. Deportation has been defined as banishment to a foreign country. It is the removal or sending back of an alien to the country from whence he came. *Fong Yue Ting v. United States,* 149 U.S. 698, 709 (1895); *Yonijuro Makasuji v. Seager,* 73 F.2d 37, 39 (9th Cir. 1934).

Section 244 of the Act requires only that an alien be "deportable under any law of the United States." Congress did not limit "deportable" to those deportable under Section 241 of the Act. If that was its intention, Congress could easily have limited its scope.

Section 244 of the Act was made a part of our Immigration and Nationality laws in order to enable aliens who entered the United States illegally and

have lived here continuously for a period of not less than seven years, and thus have sunk deep roots in this country, to receive relief from deportation and be allowed to adjust their status to that of lawful permanent residents. The absence of qualifying language in that statute reflects a desire to accord its relief to all who meet its broad requirements.

In holding that Petitioners are not deportable within the meaning of Section 244 of the Act, the Court of Appeals has, in effect, added an additional requirement for eligibility to that Section—that an alien be deportable under one of the provisions enumerated in Section 241 of the Act.

Such a holding is not consistent with the ameliorative purpose of Section 244. Section 237 of the Act, 8 U.S.C. 1227, plainly states that any alien who is excluded shall be immediately deported. Petitioners were ordered excluded and deported, and then allowed to remain in the United States in parole status. As excluded aliens, they are subject to immediate deportation, and as such are "deportable" within the meaning of Section 244 of the Act. Any other reading of Section 244 would deny to the Petitioners their right to a reasonable construction of the statute in their favor, and would frustrate the purpose of the statute. *Barber v. Gonzales,* supra; *Fong How Tan v. Phelan,* supra; *Wadman v. INS,* supra.

CONCLUSION

Petitioners satisfy the eligibility requirements for the relief of suspension of deportation, Section 244 of the Act. There is no language in Section 244 limiting or restricting its scope in the manner asserted by the Court of Appeals for the Ninth Circuit. In reversing the decision of the District Court in favor of Petitioners, the Court of Appeals has improperly interpreted the provisions of Section 244 and narrowed by construction the statutory language so as to unreasonably restrict the scope of the law, thereby denying Petitioners an opportunity to apply for this statutory remedial relief, and in so doing have frustrated the purpose of the statute.

In holding that Petitioners are ineligible for relief under Section 244, the lower court has raised important questions pertaining to the administration of the immigration and nationality laws of the United States. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

For the reasons set forth, it is respectfully submitted that the Petition for Writ of Ceritiorari should be granted.

Dated, San Francisco, California,
August 17, 1973.

JOSEPH S. HERTOGS,
Attorney for Petitioners.

(Appendices Follow)

Appendix A

DECISION OF THE DISTRICT COURT IN RE YUEN SANG LOW, SHUNG POY LOUIE, AND FAT YING CHIN

In the United States District Court
For the Northern District of California

Yuen Sang Low, Petitioner, vs. John N. Mitchell, Attorney General of the United States, and Cecil W. Fullilove, District Director, San Francisco District, Immigration and Naturalization Service, Respondents.	No. C-70 978 AJZ
Shung Poy Louie, Petitioner, vs. John N. Mitchell, Attorney General of the United States, and Cecil W. Fullilove, District Director, San Francisco District, Immigration and Naturalization Service, Respondents.	No. C-70 979 ACW
Fat Ying Chin, Petitioner, vs. John N. Mitchell, Attorney General of the United States, and Cecil W. Fullilove, District Director, San Francisco District, Immigration and Naturalization Service, Respondents.	No. C-70 980 ACW

[Filed August 7, 1970]

ORDER AND JUDGMENT

This cause having come on to be heard on the motions of the respondents for summary judgment and

the cross-motion of petitioners for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, the certified administrative files, the briefs, and arguments of counsel, finds

The statute under which petitioners seek relief from the Immigration and Naturalization Service in this case is Section 1254(a) of Title 8, United States Code Annotated. Within the meaning of that section the petitioners, in the instant cases, have been *physically present* in the United States in excess of the prescribed number of years and are therefore entitled to seek the relief prayed for and are entitled to a hearing thereon from the Attorney General of the United States.

The case of Leng May Ma v. Barber, 1958, 357 U.S. 185, applies to Section 1253(h) of Title 8, United States Code, and is not, in this Court's view, controlling in its interpretation of Section 1254(a).

Under the circumstances, the relief prayed for by petitioners is granted.

Ordered, that respondents' motion for summary judgment be and the same is hereby in all respects denied, and it is further

Ordered, that the petitioners' motion for summary judgment is granted, and the administrative records are remanded to the respondents for further action in accordance with this decision.

Dated: August 7, 1970

/s/ Alfonso J. Zirpoli
United States District Judge

Appendix B

DECISION OF COURT OF APPEALS IN RE YUEN SANG LOW, SHUNG POY LOUIE AND FAT YING CHIN

United States Court of Appeals
For the Ninth Circuit

No. 26,741

Yuen Sang Low, Shung Poy Louie, and Fat Ying Chin,
Plaintiffs-Appellees,

vs.

The Attorney General of the United States, and Cecil W. Fullilove, District Director, San Francisco District, Immigration and Naturalization Service,
Defendants-Appellants.

[May 30, 1973]

Appeal from the United States District Court for the Northern District of California

Before: DUNIWAY and ELY, Circuit Judges, and BYRNE, JR., District Judge*

DUNIWAY, Circuit Judge:

OPINION

The three appellees in this case are aliens who sought admission into the United States more than

*Honorable Wm. Matthew Byrne, Jr., United States District Judge, Central District of California, sitting by designation.

twenty years ago. They claimed to be citizens, but those claims were rejected, and each of them was ordered excluded by the Board of Immigration Appeals. While those proceedings were pending, each of them was paroled into the United States, pursuant to 8 U.S.C. § 1182(d)(5). For reasons which are not explained in the record, they have been in the United States on parole status ever since.

Each alien submitted an application for a suspension of deportation and adjustment of status to that of an alien lawfully admitted for permanent residence under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1). The District Director of the Immigration and Naturalization Service refused to accept the applications on the ground that these aliens are not eligible for the relief afforded by that section. The aliens then sought review in the district court under 5 U.S.C. § 701, et seq. The court granted their motion for summary judgment. It found that they had been "physically present" in the United States in excess of seven years, as required by section 244(a)(1), and that they were therefore entitled to file an application for suspension of deportation. We reverse.

Section 244(a) of the Act provides in pertinent part:

> ". . . [T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

> (1) is deportable under any law of the United States . . . ; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application. . . ."

To bring themselves within this section, the aliens must satisfy two requirements: (1) They must have been "physically present in the United States" for the required period and, (2) they must be "deportable." In this case the aliens do not meet either requirement.

1. If the words "physically present" are to be taken literally, it is obvious that the aliens meet this requirement. However, we are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.

In *Leng May Ma v. Barber,* 1958, 357 U.S. 185, the Court had before it the question whether an alien who, like the aliens in this case, was considered excludable but had been paroled into the United States, was "within" the United States under section 243(h) of the Act, 8 U.S.C. § 1253(h), and so entitled to seek withholding of deportation under that section. Surely, under the literal meaning of "within" the alien was "within" the United States. But the Court held that legally she was not.

The Court pointed to the long standing distinction "between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." (P. 187.) It further said:

> "In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry'. *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 212 (1953). See *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596 (1953). The distinction was carefully preserved in Title II of the Immigration and Nationality Act. Chapter 4 subjects those seeking admission to 'exclusion proceedings' to determine whether they 'shall be allowed to enter or shall be excluded and deported.' 66 Stat. 200, 8 U.S.C. § 1226(a). On the other hand, Chapter 5 concerns itself with aliens who have already entered the United States and are subject to 'expulsion,' as distinguished from 'exclusion,' if they fall within certain 'general classes of deportable aliens.' 66 Stat. 204, 8 U.S.C. § 1251. Proceedings for expulsion under Chapter 5 are commonly referred to as 'deportation proceedings.' Parenthetically, the word 'deportation' appears also in Chapter 4 to refer to the return of excluded aliens from the country, but its use there reflects none of the technical gloss accompanying its use as a word of art in Chapter 5."

The Court then cited (p. 188) a list of cases holding that aliens held in custody pending determination of their admissibility have not made "an entry, though the alien is physically within the United States." "It seems quite clear that an alien so confined would not be 'within the United States' for purposes of § 243(h)." (P. 188.) The Court went on to hold that parole, as a substitute for custody, did not change

the result; the parolee still was not "within" the United States. It relied in part on section 212(d)(5) of the Act, (8 U.S.C. § 1182(d)(5)), which states that parole "shall not be regarded as an admission of the alien," and that, after return to custody, the alien's case "shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Leng May Ma requires the same result here. Section 244, like section 243, is a part of Chapter 5, not Chapter 4. The use of different language in section 244 does not change the result. It is true that in *Leng May Ma* the court said that detained aliens are "physically within" the United States, and the aliens seek to distinguish the case on that ground. But the distinction will not wash.

Before the adoption of the Act in 1952, the statute provided that an alien who had "resided continuously in the United States for seven years or more" was eligible to apply for suspension of deportation. (Act of July 1, 1948, 62 Stat. 1206.) It is clear that if residence were still the criterion, the aliens could not meet it. In *Kaplan v. Tod,* 1925, 267 U.S. 228, (cited with approval in *Leng May Ma, supra,* at p. 189), which involved a paroled alien, Mr. Justice Holmes said:

> "The appellant could not lawfully have landed in the United States . . . , and until she legally landed 'could not have dwelt within the United States'. . . . When her prison bounds were enlarged by committing her to the custody of the

> Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory at the boundary line and had gained no foothold in the United States." (P. 230.)

The seven years' residence language of the statute was criticized on the ground that an alien could enter the United States and establish residence and then go abroad for an extended period while technically maintaining residence here and thus remain eligible for suspension of deportation. It was in response to that criticism that the Congress in 1952 modified the statute by including the "physically present . . . for a continuous period" requirement. See S. Rep. No. 1515, 81st Cong. 2d Sess., 595-604 (1950). Thus the purpose of Congress was to tighten the statute insofar as it applied to aliens who had "entered" the United States, not to extend the application of the statute to those who had been excluded but paroled into the United States pending final determination of their excludability. The decision in *Leng May Ma* is, we think, just as applicable to the "physically present in the United States" language of section 244 as it is to the "within the United States" language of section 243.

2. Assuming, however, that we are in error in this respect, *Leng May Ma* would nevertheless require a reversal in this case. This is because the aliens are not "deportable" within the meaning of section 244(a). This position at first blush seems as anomalous as our holding that these aliens are not technically physically present in the United States. The law, however, is that aliens paroled into the United States have not

been admitted into the United States. See 8 U.S.C. § 1182(d)(5). They are persons subject to "exclusion" which, as is pointed out in *Leng May Ma, supra,* p. 187, is to be distinguished from "expulsion" or "deportation." It is true that, as persons subject to exclusion, under Chapter 4 of Title II of the Act, 8 U.S.C. §§ 1221-1230, these aliens are subject to "immediate deportation." See 8 U.S.C. § 1227. Nevertheless, they are not "deportable under any law of the United States" within the meaning of section 244(a).

In *Leng May Ma, supra,* as we have seen, the Court held that one of the rights and privileges unavailable to excludees was application for withholding of deportation under section 243(h). The rationale is equally applicable to section 244(a). The Court held that the fact that Chapter 4 provides for the "deportation" of excludees does not render such excludees "deportable" as that term is used in Chapter 5. The Court found it significant that the provision for withholding of deportation, (§ 243(h)), was found in Chapter 5. So is the provision of section 244(a) in question here. Under the compulsion of *Leng May Ma, supra,* we hold that the appealing aliens are not deportable within the meaning of section 244(a). That term, as *Leng May Ma* holds, is a word of art and does not cover excludable aliens who have been paroled into the country.

We can find nothing in the law that would permit us to hold that section 244(a) becomes applicable if parole continues for an inordinate length of time. We

are regretfully contrained to hold that suspension of deportation under section 244(a) is not a right or privilege extended to those paroled into the United States and who are therefore legally merely on the threshold of initial entry.

The judgment is reversed with directions to enter summary judgment in favor of the appellants.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. Whenever there is a reasonable doubt as to the proper interpretation of statutes granting discretionary power to the Attorney General in respect to the deportation of aliens, the doubt should be resolved in favor of the aliens. *See Barber v. Gonzales,* 347 U.S. 637 (1954); *Fong How Tan v. Phelan,* 333 U.S. 6 (1948). *See also Errico v. I&NS,* 349 F.2d 541 (9th Cir. 1965), *aff'd,* 385 U.S. 214 (1966); and *Garcia-Gonzales v. I&NS,* 344 F.2d 804 (9th Cir. 1965).

My Brother Duniway's opinion is, typically, written with the utmost care; nevertheless, I cannot subscribe to the technicality of its reasoning. In granting relief to the aliens here involved, District Judge Zirpoli wrote, in part:

> "The statute under which petitions seek relief from the Immigration and Naturalization Service in this case is Section 1254(a) of Title 8, United States Code Annotated. Within the meaning of that section the petitioners, in the instant cases, have been *physically present* in the United States in excess of the prescribed number of years and are therefore entitled to seek the relief prayed

for and are entitled to a hearing thereon from the Attorney General of the United States.

"The case of Leng May Ma v. Barber, 1958, 357 U.S. 185, applies to Section 1253(h) of Title 8, United States Code, and is not, in this Court's view, controlling in its interpretation of Section 1254(a)." (emphasis in original)

Agreeing with Judge Zirpoli, I would affirm his "Order and Judgment" remanding the cause for the Attorney General's consideration of the appellees' applications for suspension of deportation.

Appendix C

ORDER FOR RECALL AND STAY OF MANDATE ISSUED BY THE COURT OF APPEALS

United States Court of Appeals
For the Ninth Circuit

No. 26,741

Yuen Sang Low, Shung Poy Louie, and Fat Ying Chin,
Appellees-Plaintiffs,

vs.

The Attorney General of the United States, and R. L. Williams, District Director, San Francisco District, Immigration and Naturalization Service,
Appellants-Defendants.

[Filed July 16, 1973]

Before: DUNIWAY and ELY, Circuit Judges, and BYRNE, JR., District Judge.

ORDER

The motion for recall and stay of mandate in this case is granted. The mandate is hereby recalled, and issuance of a new mandate is stayed provided that a petition for a writ of certiorari is filed within thirty days from the date of this order. If such a petition is filed within that time, this order will continue in effect until the Supreme Court of the United States has acted upon and has finally disposed of the petition for a writ of certiorari.

Appendix D

ORDER OF THE COURT OF APPEALS EXTENDING THE STAY OF MANDATE

(The Order has not been received
by Petitioner at the time of filing this Petition.)